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No. 81-2395

IN THE

Supreme Court of the United States

October Term 1981

BRUCE KING, Governor of the State of New Mexico, and SHIRLEY HOOPER, Secretary of State of the State of New Mexico,

Appellants,

vs.

FRANK I. SANCHEZ, et al., RAYMOND VARGAS, et al., D.H. "CHILI" YAZZIE, et al., RONALD G. OLGUIN, et al., and PATRICIA M. MARSH,

Appellees.

ON DIRECT APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

MOTION OF APPELLEES RAY VARGAS, AL VALDEZ AND THE AMERICAN CIVIL LIBERTIES UNION OF NEW MEXICO TO AFFIRM

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QUESTION PRESENTED

Whether the district court erred in holding that the 1982 reapportionment of the New Mexico legislature, based on formulaic estimates of population demonstrated to be grossly and systematically in error and which yielded legislative districts with population deviations in excess of 90% from ideal population, violates the one-person, one-vote principle of the equal protection clause of the fourteenth amendment?

TABLE OF CONTENTS

Page

Question Presented i

Table of Authorities iv

Opinions Below 1

Jurisdiction 2

Statement 2

Argument:

I.

APPELLANTS MISCHARACTERIZE THE DECISIONS OF THE DISTRICT COURT, AND APPELLANTS' ARGUMENTS RELY ON FACTS NOT CONTAINED IN THE RECORD. AS A CONSEQUENCE, THE QUESTION PRESENTED BY APPELLANTS IN THEIR JURISDICTIONAL STATEMENT IS HYPOTHETICAL AND INCAPABLE OF RESOLUTION ON THE RECORD 6

II.

THE DISTRICT COURT CORRECTLY HELD THE 1982 REAPPORTIONMENT PLANS UNCONSTITUTIONAL, IN THAT THE ACTUAL POPULATIONS OF THE VARIOUS LEGISLATIVE DISTRICTS UNDER THE PLANS WERE GROSSLY AND UNCONSTITUTIONALLY MALAPPORTIONED 12

A. The Fourteenth Amendment Requires That Legislative Districts Be of Nearly Equal Population 12

B. The January 1982 Reapportionment Plans Create Population Deviations Greatly in Excess of Permissible Limits 14

C. The January 1982 Reapportionment Plans, in Basing Reapportionment on Artificial

Page

Population Figures As Derived by the Votes-Cast Formula, Are Not a Population-Based Reapportionment Within the Meaning of the One-Person, One-Vote Formulation Under the Fourteenth Amendment 15

D. Appellants Have Failed to Justify the Gross Deviations Demonstrated in This Record or to Establish the Special Circumstances Which Could Warrant the Utilization of a Population Base Other Than Total Population. As Such, the 1982 Reapportionment Plans Fail to Satisfy the One-Person, One-Vote Requirement of the Fourteenth Amendment 17

Conclusion 21

Appendix A A-1

Appendix B B-1

TABLE OF AUTHORITIES

Page

CASES:

Abate v. Mundt, 403 U.S. 182 (1971) 13

Baker v. Carr, 369 U.S. 186 (1962) 15

Burns v. Richardson, 384 U.S. 73 (1966) .. 8, 9, 18, 19, 20

Connor v. Finch, 431 U.S. 407 (1977) 12, 13

Gaffney v. Cummings, 412 U.S. 735 (1973) 12, 18

Graves v. Barnes, 446 F. Supp. 560 (W.D. Tex. 1977) . 14

Lucas v. Colorado General Assembly, 377 U.S. 713 (1964) 15

Mahan v. Howell, 410 U.S. 315 (1973) 8, 13, 15

Panior v. Iberville Parish School Board, 498 F.2d 1232 (5th Cir. 1974) 14

Reynolds v. Sims, 377 U.S. 533 (1964) 8, 11, 12, 13, 15, 16, 17

Swann v. Adams, 385 U.S. 440 (1967) 13

Whitcomb v. Chavis, 403 U.S. 124 (1971) 13

White v. Regester, 412 U.S. 755 (1973) 13

WMCA, Inc. v. Lomenzo, 377 U.S. 633 (1964) 15

STATUTES:

28 U.S.C. § 1253 2

28 U.S.C. § 2284 4

42 U.S.C. § 1973 3

No. 81-2385

IN THE

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BRUCE KING, Governor of the State of New Mexico, and SHIRLEY HOOPER, Secretary of State of the State of New Mexico,

Appellants,

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FRANK I. SANCHEZ, et al., RAYMOND VARGAS, et al., D.H. "CHILI" YAZZIE, et al., RONALD G. OLGUIN, et al., and PATRICIA M. MARSH,

Appellees.

ON DIRECT APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

MOTION TO AFFIRM

Raymond Vargas, Al Valdez, and the American Civil Liberties Union of New Mexico, by counsel and pursuant to Rule 16(1) (c) of this Court's rules, move that the judgment of the district court in this case be affirmed.

OPINIONS BELOW

The April 5, 1982, opinion and order of the district court, granting a preliminary injunction, J.S. App. at A-1 - A-3, is unreported. The April 8, 1982, opinion and order of the district court, adjudicating the 1982 New Mexico legislative reapportionment unconstitutional, J.S. App. at B-1 - B-4, is also unreported.

JURISDICTION

The orders of the district court, J.S. App. at A-1 - A-3 and B-1 - B-4, were entered on April 5 and 8, 1982. The notice of appeal, J.S. App. at C-1 - C-2, was filed by defendants on April 29, 1982. The appeal was docketed in this Court on June 28, 1982. Jurisdiction of this Court is invoked under 28 U.S.C. § 1253.

STATEMENT

1. These five consolidated suits involve the constitutionality of the January 1982 New Mexico House and Senate reapportionment plans,[1] under the one-person, one-vote principles of the fourteenth amendment. On January 16, 1982, the New Mexico House and Senate reapportionment plans were enacted by a special session of the New Mexico legislature. These reapportionment plans were based not on actual population counts but rather were based on artificial population figures "derived" from a "votes-cast" formula. Like many states, New Mexico employs as the building blocks of legislative districts for reapportionment political geographic units (precincts) which differ from the geographic units (blocks and enumeration districts) employed for the decennial census count by the U.S. Census Bureau. Therefore, the official 1980 census data did not readily provide census counts for the precincts in New Mexico. Unlike the other states with similar problems, New Mexico did not seek to convert the census data to precinct counts or estimates. Instead, the New Mexico legislature employed the "votes-cast" formula.

The formula starts with the 1980 official census count for the total population of the county and then assigns to

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[1]The House reapportionment plan is found in J.S. App. at D-1 - D-7, and the Senate reapportionment plan is found in J.S. App. at E-1 - E-7.

the several precincts in that county derived population figures determined by the proportion of votes cast in the precincts to votes cast in the county.[2] These derived precinct populations are used to determine the populations of the legislative districts.[3] The formula was employed without any statistical study or inquiry to determine whether the formulaic determinations of precinct (and hence district) populations in any way approximated the actual populations of the precincts or districts.

2. Several lawsuits were filed challenging the reapportionment plans. The challenges of the various groups of plaintiffs were based on the equal protection clause of the fourteenth amendment, the fifteenth amendment, and section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973. The several complaints alleged that the reapportionment

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[2]The formula, as set forth in the reapportionment acts, is as follows:

$$\frac{\text{County Population According to the Last Official United States Census}}{\text{Total Votes Cast in the County in the Most Recent General Election}} \times \text{Total Votes Cast in Each Precinct in the Most Recent General Election} = \text{Derived Precinct Population}$$

[3]The formulaic estimates of district populations derived from the votes-cast formula are not uniformly applied throughout New Mexico. Some legislative district populations are determined not by use of the votes-cast formula, but directly from U.S. Census Bureau counts. Thus, Senate District 7 is comprised wholly of Colfax, Union, Harding, and Quay Counties. As such, the votes-cast formula estimates of precinct populations are not used in this district and the population of the district is determined by reference to the total populations of the counties as reported by the census. In Senate District 6, however, the population of the district is determined by use of the votes-cast estimates. Therefore, in comparing the populations of Senate Districts 6 and 7 to determine if they are nearly equal in population, the 1982 reapportionment plans are comparing one district's total population as reported by the census against another district's population as determined by the votes-cast formula.

plans were racially discriminatory and failed to establish population equality among legislative districts. Subsequently, the United States of America intervened as a plaintiff through the Civil Rights Division of the Department of Justice.

3. Pursuant to 28 U.S.C. § 2284, a three-judge district court was convoked and the several lawsuits were consolidated for trial. The district court informed all parties that trial would be limited to the issue of the constitutionality of the reapportionment plans under the one-person, one-vote principles of the fourteenth amendment, and that all other issues were reserved. After extensive pre-trial discovery and the submission of pre-trial briefs by all parties, a four-day trial was held on March 22-25, 1982. Testimony was taken from twelve live witnesses, totaling in excess of 1,000 pages of transcript. In addition, the depositions of three more witnesses were introduced into the record, and several hundred exhibits, comprising thousands of pages, were also introduced.

4. On April 5, 1982, the district court entered a preliminary injunction, enjoining the Secretary of State from enforcing the April 6, 1982, filing deadline for candidates for the state legislature under the challenged reapportionment plans. The district court specifically found that the votes-cast formula was an inaccurate predictor of population[4] and further found that the inaccuracies in population estimates derived from the formula produced "deviations [from ideal] populations

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[4]The district court stated: "The record demonstrates that the application of the 'votes-cast formula' for ascertaining precinct population causes substantial variations between the presumed precinct populations for reapportionment purposes and actual precinct populations as determined from United States Census data." J.S. at A-2.

which . . . appear to exceed any which have heretofore passed constitutional scrutiny." J.S. App. at A-2. On April 8, 1982, the district court entered a Memorandum Opinion and Order finally adjudging the reapportionment plans unconstitutional. The court reaffirmed its finding that the votes-cast formula was an inaccurate predictor of district population and found that the districts created under the reapportionment plans deviated from the ideal population by 94% and 83%, respectively, for the House and Senate. J.S. App. at B-2.

The district court declined to create new reapportionment plans, but rather afforded to "the New Mexico Legislature an adequate opportunity to reapportion itself. The Legislature must make an honest and good faith effort to construct the legislative districts as nearly of equal population as is practicable." J.S. App. at B-3. The district court specifically recognized the difficulty caused by the fact that official census counts were taken from geographical units not coincident with precinct boundaries. *Id.* The court went on to state: "However, we do not attempt to instruct the Legislature on the method to employ in again attempting reapportionment. What we do require is that the Legislature employ a good-faith effort to construct legislative districts on the basis of actual population." J.S. App. at B-3 - B-4.[5]

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[5]The effect of the April 5 and 8, 1982, orders was to enjoin the June 1, 1982, New Mexico primary for legislative offices. Curiously, subsequent to the entry of the April 8, 1982, orders the defendants moved the district court to enjoin the defendants from holding the June 1, 1982, primary for other statewide, congressional and county offices. On April 13, 1982, over the objections of the Vargas plaintiffs, the district court entered such an order. Within days, a number of candidates for nonlegislative offices, whose primary elections had been postponed were permitted to intervene. When the district court denied intervenors' motion to reconsider the April 13, 1982, order several intervenors appealed to this Court and moved for a stay of the April 13, 1982, order of the district court. On April 23, 1982, this Court entered an order staying the April 13, 1982, order of the

ARGUMENT

The judgment of the district court should be affirmed for two independent reasons. First, the appellants' characterizations of both the district court's decisions and the record below are so extravagant as to make hypothetical both the issue presented by their Jurisdictional Statement and appellants' arguments. Second, once cast correctly, the district court's decisions are not only consistent with this Court's decisions, but mandated by them. Indeed, the deviations from population equality contained in the New Mexico legislative reapportionment plans at issue are so great that, to appellees' knowledge, this Court has not been presented with deviations of this magnitude for nearly a decade.

I.

APPELLANTS MISCHARACTERIZE THE DECISIONS OF THE DISTRICT COURT, AND APPELLANTS' ARGUMENTS RELY ON FACTS NOT CONTAINED IN THE RECORD. AS A CONSEQUENCE, THE QUESTION PRESENTED BY APPELLANTS IN THEIR JURISDICTIONAL STATEMENT IS HYPOTHETICAL AND INCAPABLE OF RESOLUTION ON THE RECORD.

The question presented by appellants' Jurisdictional Statement characterizes the district court's decisions below as requiring that "legislative apportionment must be based exclusively on raw population census figures." Nowhere in their Jurisdictional Statement do appellants

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district court to the extent that it postponed the June 1, 1982, primary as to non-legislative offices. This Court explicitly left undisturbed the district court's April 5 and 8, 1982, orders enjoining the June 1, 1982, primary as to state legislative offices. *Bingaman v. King*, No. A-889 (O.T. 1981), 50 U.S.L.W. 3857 (U.S. April 23, 1982).

explain what they mean by "raw population census figures." More important, at no time did the district court require the State of New Mexico to reapportion on the basis of "raw population census figures," whatever that may mean.

In its April 8, 1982, decision, the district court specifically and explicitly refrained from dictating to the legislature what method or what data were to be used in reapportionment: "However, we do not attempt to instruct the legislature on the method to employ in again attempting reapportionment." J.S. App. at B-3 - B-4. Moreover, the district court did not require that reapportionment be based on official census counts of population. The court explicitly qualified that "*if* census figures are to be used, it is necessary to allocate population figures from the census areas to the precincts to obtain a precinct count." J.S. App. at B-3 (emphasis added).

As can be seen, far from requiring that "raw population census figures" be used in reapportionment, the district court left plenary authority to the legislature as to both the method and data to be used in reapportionment.[6] Indeed, all that the district court required is that reapportionment be based on "actual population," J.S. App. at B-4, and that the districts be "nearly of equal population as is practicable." J.S. App. at B-3. As discussed in part II, *infra*, both of these requirements are

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[6]The options open to the State of New Mexico as alternatives to the use of official census data were many. Thus the state could have used census data for some areas and could have conducted its own count for other areas where the state determined the official census count to be inaccurate or too difficult to convert. Alternatively, there were populations counts other than the decennial census available to the state, at least for certain areas. Thus, there were BIA counts of Indians residing on the numerous Indian lands in New Mexico.

firmly founded in the one-person, one-vote jurisprudence and this Court's decisions.

The appellants' mischaracterization of the district court's decisions does not end with their question presented. In their first argument, appellants characterize the district court as engaging in a "per se rejection" of the votes-cast formula. To the contrary, the district court's April 8, 1982, decision reveals that the court considered the state's advanced justifications for use of the votes-cast formula and found those justifications wanting under this Court's prior decisions.[7] The court expressly recognized that there may be occasions when deviation from a total population basis for reapportionment is warranted or where "consideration of factors other than population" is appropriate. The district court found, however, that the circumstances necessary to support such justifications were not proved in this case. J.S. App. at B-2.

Appellants further erroneously assert that the district court required that reapportionment be based on "total population data," "to the exclusion of any other legitimate population basis." J.S. at 8. As described above,

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[7]The district court stated:

> The recitations in each of the Acts as to their reasons and purposes cannot be regarded as ground for an exception to a reliance on population figures. "Population is, of necessity, the starting point for consideration and the controlling criterion for judgment in legislative apportionment controversies." *Reynolds v. Sims*, 377 U.S. 533, 567 (1964). Use of a registered voter or actual voter basis in reapportionment can be sustained only when it produces "a distribution of legislators not substantially different from that which would have resulted from the use of a permissible population basis." *Burns v. Richardson*, 384 U.S. 73, 93 (1966). And while a state can justify the consideration of factors other than population by showing that those considerations further a rational state policy, those factors "cannot constitutionally be permitted to emasculate the goal of substantial equality." *Mahan v. Howell*, 410 U.S. 315, 326 (1973). J.S. App. at B-2.

the district court expressly recognized that a population base other than total population (i.e., voting-age population) may be permissible, but only under certain circumstances, as established by this Court in *Burns v. Richardson*, 384 U.S. 73 (1966). Quite simply, the district court held that those circumstances had not been established in this case. Finally, far from requiring New Mexico to employ "raw census data," as appellants repeatedly assert, the district court recognized that "*if* census figures are to be used," extrapolation from and refinement of the official census counts would be necessary. J.S. App. at B-3 (emphasis added).

Appellants' characterization of the district court's decisions below is not borne out by the court's opinions. What the district court did decide is that reapportionment must be population-based and that the votes-cast formula is a grossly and systematically erroneous predictor of precinct and district population. The court found that as a consequence of the use of the votes-cast formula, population equality requirements for reapportionment were not met and the deviations from ideal district populations exceeded 90% in the House and 80% in the Senate. As may be seen, therefore, the appellants' suggestions that the district court predicated its decisions on the assumptions that (1) official census data had to be used, (2) the census data had to be used in a "raw population" form, (3) total population was the exclusive basis for reapportionment, and (4) a per se approach was employed by the district court are all erroneous. As a consequence, both the question presented in appellants' Jurisdictional Statement and appellants' argument addressed to that question are irrelevant to what was decided below.

Moreover, appellants' arguments are predicated on

factual assertions which are not borne out by the record below. Appellants base their arguments on two salient "facts." First, appellants assert that there are "substantial concentrations of transients, aliens and other ineligible residents within [New Mexico's] total population," J.S. at 2, and that these ineligibles are concentrated geographically in "pockets." J.S. at 7. Contrary to appellants' assertions, the record fails to disclose either the extent of the presence in New Mexico of aliens, transients, or other "ineligibles," or the demographic residential patterns of whatever "ineligibles" there are in New Mexico. In short, this Court will be unable to determine from the record how many "ineligibles" reside in New Mexico and where they reside.

Second, appellants' argument is predicated on the factual assertion that the votes-cast formula distributes these ineligibles "in such a way as not to overly dilute a given election district," J.S. at 13, and thereby achieves "a more accurate estimate of citizen population." J.S. at 11. Not only are these "factual" assertions unsupported by the record below, but they are directly contrary to the testimony of even the appellants' witnesses. Clay Buchanan, the director of the New Mexico Legislative Council Service and one of appellants' chief witnesses at trial, testified that the formula was not intended to estimate total populations of precincts or any subgroup of total population. Tr. 791-92 (*see* Appendix A). Indeed, Mr. Buchanan candidly admitted that the formula arrives at an "artificial figure" for the population of any given precinct, Tr. 787-88 (*see* Appendix A), and referred to the population figures derived from the formula as "phony populations." Tr. 710 (*see* Appendix A). In light of this evidence, it is no wonder that the district court held that reapportionment based on "phony popu-

lations" derived from the formula did not constitute a population-based reapportionment as required by this Court. *See Reynolds v. Sims*, 377 U.S. 537, 567 (1964).

Contrary to appellants' assertions, the votes-cast formula is not designed to estimate accurately either total population or any subgroup of population. Moreover, the fact that the formula is a grossly and systematically inaccurate predictor of population is uncontradicted in the record below and is not challenged by appellants in their Jurisdictional Statement. Nowhere in the Jurisdictional Statement do appellants challenge the salient fact found by the district court—that the legislative districts created by the reapportionment plans contain maximum deviations from population ideals in excess of 90% in the House plan and 80% in the Senate plan.[8] Appellants seek to avoid this constitutionally fatal defect in the reapportionment plans at issue by seeking to turn this Court's attention to hypothetical issues, irrelevant to the decisions below and incapable of resolution on this record. The decision of the district court should be affirmed.

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[8]Appellants' reference in their Jurisdictional Statement that the legislative reapportionment plans at issue contained deviations from population ideals slightly less than 10%, J.S. at 4, is not a challenge to the district court's factual finding. Rather, appellants' statement of deviations contained in the plans refers to the "phony" population estimates created by the votes-cast formula. The district court found, however, that with reference to actual population, the deviations were in excess of 90% for the House plan and 80% for the Senate plan. This finding is not challenged by appellants.

II.

THE DISTRICT COURT CORRECTLY HELD THE 1982 REAPPORTIONMENT PLANS UNCONSTITUTIONAL, IN THAT THE ACTUAL POPULATIONS OF THE VARIOUS LEGISLATIVE DISTRICTS UNDER THE JANUARY 1982 REAPPORTIONMENT PLANS WERE GROSSLY AND UNCONSTITUTIONALLY MALAPPORTIONED.

States in reapportioning their legislatures must ensure "that legislative districts be of nearly equal population, so that each person's vote may be given equal weight in the election of representatives." *Connor v. Finch*, 431 U.S. 407, 416 (1977). In January 1982, the New Mexico legislature met in special session to reapportion itself. The reapportionment plans which were enacted purported to create "districts of equal populations," 1982 N.M. Laws, chapters 1 and 2, thereby purportedly affording to New Mexico citizens the rights guaranteed by *Reynolds v. Sims*, 377 U.S. 533 (1964), and its progeny. Notwithstanding the illusion these reapportionment plans sought to create, they fell far short of creating districts of nearly equal population; therefore, they do not satisfy the requirements of the fourteenth amendment.

A. The Fourteenth Amendment Requires That Legislative Districts Be of Nearly Equal Population.

The mandate of *Reynolds v. Sims*, 377 U.S. 533 (1964), with regard to apportionment of state legislatures has been refined into what is now essentially a three-tiered review of deviations from population equality. First, the Court has considered under 10% deviations to be of "prima facie constitutional validity." *Connor v. Finch*, 431 U.S. at 418; *see Gaffney v. Cummings*, 412 U.S. 735

(1973) (7.83% maximum deviation from the ideal); *White v. Regester*, 412 U.S. 755 (1973) (9.9% maximum deviation from the ideal).[9]

Second, deviations of greater magnitude may be justified only if "based on legitimate considerations incident to the effectuation of a rational state policy." *Mahan v. Howell*, 410 U.S. 315, 325 (1973) (quoting *Reynolds v. Sims*, 377 U.S. 533, 579 (1964)); *see also Abate v. Mundt*, 403 U.S. 182 (1971) (11.9% maximum deviation permitted with justification). *Mahan* represents the greatest deviation yet tolerated by the Court. There, a 16.4% maximum deviation in state legislative reapportionment was upheld because the goal of maintaining cities and counties as legislative districts was furthered by the legislature's reapportionment plan.

Finally, even where there is such justification, the divergences must be within tolerable limits, for a "State's policy urged in justification of disparity in district population, however rational, cannot connstitutionally be permitted to emasculate the goal of substantial equality." *Mahan v. Howell*, 410 U.S. at 326. Thus, at the third tier the Court has rejected a 26% maximum deviation. *Swann v. Adams*, 385 U.S. 440 (1967); *see also Whitcomb v. Chavis*, 403 U.S. 124 (1971) (24.7% maximum deviation in the House found unconstitutional). As the Court stated in *Mahan*, 16.4% deviations "may well approach the tolerable limits." 410 U.S. at 329. Indeed, the lower federal courts have viewed 16.4% as the extreme limit of

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[9]Maximum deviations of less than 10% are not, however, a talisman. Courts routinely consider not only maximum deviations, but also average deviations, and the incidence of deviation, in determining whether the constitutional mandate of population equality has been met. *See e.g., Connor v. Finch*, 431 U.S. 407, 416-17 (1977).

justifiable deviation from equality. *See Panior v. Iberville Parish School Board*, 498 F.2d 1232, 1236 (5th Cir. 1974); *Graves v. Barnes*, 446 F. Supp. 560 (W.D. Tex. 1977).

B. The January 1982 Reapportionment Plans Create Population Deviations Greatly in Excess of Permissible Limits.

The record below establishes without contradiction that the votes-cast formula as applied in the January 1982 reapportionment plans systematically caused widespread and gross deviations from actual population. The trial court found maximum deviations of 94% in the state House plan and 83% in the Senate plan. *See* J.S. App. at B-2. In addition, the record discloses further uncontroverted evidence that in the House, District 13 in Bernalillo County had 29,912 actual population while District 47 in Santa Fe County had 12,402 actual inhabitants—well over a two-to-one ratio in maximum deviation from the ideal of 18,613. Plaintiffs' Exhibits 105, 114 (*see* Appendix B). Under the January 1982 House reapportionment plan, there was an average deviation of 18% from the ideal population. *Id.* Forty-three of the seventy House districts deviated by more than 10%, at least thirty-one districts deviated by more than 15%, and at least twenty-seven districts deviated by more than 20%. *Id.*

With respect to the Senate reapportionment plan, it is also uncontradicted that Senate District 11 in Bernalillo County was the most overpopulated, with 43,977 inhabitants, while District 16 in Bernalillo County, at the other extreme, had only 18,180 actual population, almost a 2.5-to-1 ratio in maximum deviation from the ideal of 31,021. Plaintiffs' Exhibit 115 (*see* Appendix B). In addition, under the January 1982 Senate reapportionment plan, there was an average deviation of 12.3% from ideal popu-

lation. Plaintiffs' Exhibits 106, 115 (*see* Appendix B). At least seventeen of the forty-two Senate districts deviated from the ideal population by 10% or more, and at least eleven districts deviated by 15% or more. *Id.*

Such massive deviations from population equality far exceed the maximum of 16.4% tolerated by the Court in *Mahan*, and greatly exceed the 26% maximum deviation found to violate equal protection in *Swann*. Indeed, the maximum deviations in the present case substantially exceed even those rejected by the Court in the earliest reapportionment cases, companions to *Reynolds v. Sims*, 377 U.S. 533 (1964). *See WMCA, Inc. v. Lomenzo*, 377 U.S. 633, 645 (1964) (ratios of 1.7 to 1 between the most and least populous state senate districts found unconstitutional); *Lucas v. Colorado General Assembly*, 377 U.S. 713, 727 (1964) (ratios of 1.7 to 1 in the house rejected).

These massive, widespread, and unprecedented deviations defy justification by any state policy. As the district court correctly held, they come within that third tier of cases where the deviation would "emasculate the goal of substantial equality." *Mahan v. Howell*, 410 U.S. 315, 326 (1973). They are well beyond the tole able limits of divergence from equality which can be justified.

C. The January 1982 Reapportionment Plans, in Basing Reapportionment on Artificial Population Figures As Derived by the Votes-Cast Formula, Are Not a Population-Based Reapportionment Within the Meaning of the One-Person, One-Vote Formulation Under the Fourteenth Amendment.

Reapportionment must be population-based. Since this Court's decisions nearly twenty years ago in *Baker v. Carr*, 369 U.S. 186 (1962), and *Reynolds v. Sims*, 377 U.S. 533

(1964), it is clear that the heart of the inquiry in determining whether a reapportionment plan satisfies the fourteenth amendment is whether the legislative districts are of equal populations. As the Court articulated this principle in *Reynolds v. Sims*, 377 U.S. at 577:

> By holding that as a federal constitutional requisite both houses of a state legislature must be apportioned on a population basis, we mean that the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable.

Clearly, then, in order to make the constitutional determination whether legislative districts are "as nearly of equal population as is practicable," reference must be made to some reasonably accurate figures of some actual population in the districts. Recognition of this principle lies at the very heart of the district court's constitutional invalidation of the January 1982 reapportionments plans.

In its Memorandum Opinion and Order of April 8, 1982, J.S. App. at B-1 - B-4, the district court concluded that "the application of the formula . . . causes substantial variations between the numbers thereby derived and United States Census figures." *Id.* at B-2. Ultimately, while the district court did "not attempt to instruct the Legislature on the method to employ in again attempting reapportionment," it rejected a formulaic approach and required the construction of legislative districts on the basis of "actual population." *Id.* at B-3 - B-4.

Virtually every witness who addressed the purpose or effect of the votes-cast formula testified that the formula did not accurately estimate the total populations of precincts and districts or any subgroup of total population.

On this record, the votes-cast formula and the reapportionment premised on it cannot withstand the "careful judicial scrutiny [which] must . . . be given, in evaluating state apportionment schemes, to the *character* as well as the degree of deviations from a strict population basis." *Reynolds v. Sims*, 377 U.S. at 581 (emphasis added). Appellees respectfully suggest that, as the district court held below, a reapportionment plan based on "artificial" or "phony" population figures simply cannot be the population-based reapportionment demanded by the equal protection clause of the fourteenth amendment.

D. Appellants Have Failed to Justify the Gross Deviations Demonstrated on This Record or to Establish the Special Circumstances Which Could Warrant the Utilization of a Population Base Other Than Total Population. As Such, the 1982 Reapportionment Plans Fail to Satisfy the One-Person, One-Vote Requirement of the Fourteenth Amendment.

Appellees have argued in part II(C) that the district court properly found that the New Mexico reapportionment plans based on the votes-cast formula were not a population-based reapportionment within the meaning of one-person, one-vote. Even if it were assumed that the plans were population-based, it is clear that the population upon which the 1982 plans base reapportionment is not total population, but some more narrow subgroup of population. The record fails to establish the special circumstances and requirements necessary to justify a population base for reapportionment other than total population. Moreover, the district court properly found no such special circumstances or justification in the record below.

In light of the massive and widespread population

deviations caused by the formula, the district court found no justification "for an exception to a reliance on population figures" See J.S. App. at B-2. The court further indicated that the requirements of *Burns v. Richardson* had not been met for "[u]se of a registered voter or actual voter basis in reapportionment." *Id.*

In its Memorandum Opinion and Order of April 8, 1982, the district court observed an appropriate deference to legislative judgment in reapportionment. However, citing *Mahan v. Howell*, 410 U.S. 315, 326 (1973), the court stated that "consideration of factors other than population . . . 'cannot constitutionally be permitted to emasculate the goal of substantial equality.'" *Id.*

On the record established below, appellants can find no comfort in *Burns v. Richardson*, 384 U.S. 73 (1966), or the dicta in *Gaffney v. Cummings*, 412 U.S. 735, 746-49 (1973), upon which they expressed reliance in their Jurisdictional Statement. In *Burns*, this Court approved, in very narrow circumstances, elimination of certain groups from the population base for reapportionment, in that case military residents and tourists. However, the votes-cast formula does not eliminate groups from the population base, but rather seeks to rearrange, redistribute or spread around some unidentifiable group in an undefinable way. There is absolutely nothing in the holding or reasoning of *Burns* which supports undefined rearrangement of population groups.

Even if the formula did seek to estimate a more narrow population base, it is clear that the special circumstances required by *Burns* are not established by this record. As a threshold inquiry, *Burns* required that before a population base more narrow than total population could

be employed, the state must establish "special population problems." In *Burns*, Hawaii established not only that the state hosted an unusually large number of military residents and transient tourists, but also that these groups (tourists and military) were not spread relatively evenly throughout the state, but were concentrated disproportionately on the Island of Oahu. Given Hawaii's unique districting plan at the time, 384 U.S. at 77, it is clear that it was not only the existence of these groups but also their maldistribution which the Court was focusing on as creating the "special population problems" necessary to depart from a population base of total population.

Appellants have failed to establish any "special population problems" as required by *Burns*. Certainly, the facts that (1) the census data include ineligibles; (2) the census data contain some inaccuracies; and (3) the census data are reported for geographic areas not coincidental to precincts cannot be sufficient to establish "special population problems," since these characteristics of the census data arise in nearly every state. Nor can appellants rely on any special problems arising from illegal aliens. First, no statistically reliable figure for the number of illegal aliens in New Mexico was introduced into evidence below. Second, and more important, there was absolutely no evidence where these illegal aliens resided in the state or that they were disproportionately concentrated in *identifiable* areas, as was the case in Hawaii. Finally, there was no evidence concerning what the votes-cast formula actually does with these illegal aliens; nor is any such evidence suggested in appellants' Jurisdictional Statement.

The second special circumstance required by *Burns* is equally lacking in this case. *Burns* required that if estimates of population were employed, it must be estab-

lished that the estimates were reasonably accurate indicators of some permissible population base. 384 U.S. at 94-95. In *Burns*, the Supreme Court approved citizens as a constitutionally permissible population base and held that it was adequately established that the "distribution of registered voters approximates distribution of state citizens." 384 U.S. at 95. This circumstance was not established by the record in this case. Appellants came forward with no studies to establish that the votes-cast formula estimates with reasonable accuracy any permissible population base.

Finally, *Burns* indicates that departure from a total population base would not be approved if the effect were to have an adverse impact on minorities by perpetuating "underrepresentation of groups constitutionally entitled to participate in the electoral process." 384 U.S. at 92-93. The record in this case amply establishes that the votes-cast formula systematically creates an adverse impact on minorities. It is clear from the record that none of the special circumstances required by *Burns* was present in this case.

CONCLUSION

For the above reasons, appellees respectfully move the Court to affirm the judgment of the district court below.

Respectfully submitted,

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Appendix A

TESTIMONY OF CLAY BUCHANAN

Tr. 710 (emphasis added)

Q. Would you please explain how you view the formula and its effect?

A. The formula was a pragmatic, political attempt based on the suggestion by the judge in the original case, in New Mexico, to follow his direction. In other words, the census division that we had, that we could rely upon that didn't mess up our precincts, was the county. And so our office, without any specific direction from the legislature, in other words, they said draft a big bill, wrote up that language.

We used estimated population simply because we didn't know what else to call it. One hardly passed a bill saying phony population. We used estimate population because it is a term they understood. It does, as a matter of checking out the plans, add up to county and state totals of the gross, or the raw census population, and one of the problems in drafting the bill is that you must have a way to proofread it, not just as you proofread something you dictate to see it it reads, but to see that all areas are in, and that it adds up.

If those figures don't add up, then you know you have left something out or you put something in twice or something.

Tr. 787-88

Q. (Mr. Goldberg, continuing.) Would you explain to me, again, what is it that the votes cast formula then is intended to do?

A. The votes cast formula, when originally enacted, was intended to comply with Judge Caswell Neal's suggestion. In rough theory, the concept was it is a raw census body count, the total county population, redistributed within the precincts, not literally, but figuratively, redistributed

within the precincts according to the number of votes cast in that precinct in the last general election.

As originally enacted, I do not think that anybody was trying to do anything but come up with a figure, an artificial figure that the legislature could use to break up counties.

Q. But —

A. I think that was the intent at that time.

Q. The artificial figure that you refer to, that is, the — what is now called the derived population?

A. Yes, sir.

Q. And in previous forms, it has been called the estimated precinct population?

A. Yes, sir.

Q. It is the precincts, though, that are the building blocks of the legislative districts?

A. Yes.

Q. So is it your testimony that the legislative districts are built on artificial figures?

A. Artificial figures that bear a relationship to total county population.

Tr. 791-92

My question is, is the votes cast formula intended to estimate a subgroup of the total population within a given geographic area?

A. No, it is not. No.

Q. So it is not intended. So the figure that is given and that figure that is used as part of the building block for an elective district, is not intended to estimate any subgroup of the population in that geographic area?

A. Of the population, no.

Q. Of any subgroup of that population?

A. I'm not trying to evade the question, what does "subgroup" mean?

Q. Is eighteen and over, registered voters, people who go into the voting booth; people who show up at the lines, but don't vote, sixty-five and over; people who have sandboxes in their backyard, any subgroup that you wanted to find, that's what I'm asking you.

JUDGE SETH: Well, it's your question, counsel, but give him a little guidance of what you mean.

Q. (Mr. Goldberg, continuing.) Does it seek to identify registered voters and estimate who are the registered voters and how many live in that precinct?

A. No.

Q. Does it seek to identify an estimate of people who are eighteen and over?

A. No, it does not.

Q. And does it seek to estimate and identify people who go into the polling booths and cast ballots?

A. No.

Q. Does it seek to estimate — identify and estimate people who are qualified to vote, but may or may not register to vote?

A. No.

Q. Does it seek to identify and estimate any other identifiable group of population within that precinct, that you can think of?

A. No. I think it seeks to eliminate.

Appendix B

Plaintiffs' Exhibit 105

HOUSE DISTRICTS
(Chaves, Cibola, Curry, DeBaca, Dona Ana, Eddy, Harding, Lea, Otero, Quay, Roosevelt, Valencia)

(Ideal: 18,613)

District	Location	Derived Pop. (Votes-Cast Formula)	Total Pop. 1980 Census	% Deviation from Ideal
7	Cibola	18,952	15,439	−17.1
8	Valencia	19,341	19,017	+ 2.2
10	Cibola and	19,102	23,335	+25.4
33	Dona Ana	18,259	14,161	+23.9
34	Dona Ana	18,426	26,403	+41.9
35	Dona Ana	18,364	16,347	−12.2
36	Dona Ana	18,200	16,849	− 9.5
37	Dona Ana	18,408	13,872	+25.5
45	Santa Fe	18,306	23,334	+25.4
46	Santa Fe	17,797	18,284	− 1.8
47	Santa Fe	17,703	12,402	−33.4
48	Santa Fe	17,752	15,239	−18.1
50	Torrance, Valencia, Bernalillo	19,076	20,074	+ 7.8
51	Otero	18,855	29,699	+59.55
52	Otero	18,510	15,341	−17.58
53	Otero	17,771	13,829	−25.7
54	Eddy	18,423	20,528	+10.29
55	Eddy	18,631	15,945	−14.33
56	Eddy	19,334	19,949	+ 7.18
57	DeBaca and Chaves	18,647	18,071	− 2.9
58	Chaves	17,741	18,715	+ .6
59	Chaves	17,890	17,585	− 5.5
60	Lea	18,601	18,825	+ 1.1
61	Lea	18,337	22,940	+23.2

District	Location	Derived Pop. (Votes-Cast Formula)	Total Pop. 1980 Census	% Deviation from Ideal
62	Lea	19,055	14,228	−23.6
63	Curry	19,409	24,488	+31.6
64	Curry	18,483	14,367	−22.8
66	Curry and Roosevelt	18,284	18,055	− 3.
67	Curry, Union	17,930	17,196	− 7.6

Summary

House Districts (Other Counties):

18 districts with a deviation of 10% or greater
15 districts with a deviation of 15% or greater
12 districts with a deviation of 20% or greater

Maximum Deviation: 92.95%

Plaintiffs' Exhibit 114

HOUSE DISTRICTS
(San Juan, McKinley, Bernalillo)

(Ideal. 18,613)

District	Location	Derived Pop. (Votes-Cast Formula)	Total Pop. 1980 Census	% Deviation from Ideal
1	San Juan	18,859	14,809	−20.44
2	San Juan	18,307	16,770	− 9.90
3	San Juan	18,403	18,552	− 0.33
4	San Juan	18,613	22,536	+21.08
5	McKinley	19,157	14,279	−23.28
6	McKinley	18,823	21,171	+13.74
9	San Juan and McKinley	18,030	21,370	+14.81
11	Bernalillo	19,493	23,173	+25.
12	Bernalillo	18,028	24,725	+33.
13	Bernalillo	19,270	29,912	+61.
14	Bernalillo and Valencia	19,267	24,298	+22.
15	Bernalillo	18,953	18,598	0.
16	Bernalillo	18,904	20,801	+12.
17	Bernalillo	17,871	16,537	−12.5
18	Bernalillo	17,721	14,800	−21.
19	Bernalillo	18,765	16,498	−11.
20	Bernalillo	19,324	28,270	+52.
21	Bernalillo	19,355	22,271	+20.
22	Bernalillo	18,921	13,698	−26.
23	Bernalillo	19,257	13,383	−28.
24	Bernalillo	19,012	15,172	−22.6
25	Bernalillo	19,309	16,120	−13.
26	Bernalillo	19,120	14,440	−22.
27	Bernalillo	18,196	17,041	− 9.
28	Bernalillo	18,961	16,683	−10.
29	Bernalillo	18,726	19,430	+ 5.

District	Location	Derived Pop. (Votes-Cast Formula)	Total Pop. 1980 Census	% Deviation from Ideal
30	Bernalillo	18,954	13,140	−29.
31	Bernalillo	18,354	15,574	−16.
69	Bernalillo	18,300	19,376	+ 4.

Summary

House Districts (San Juan, McKinley, Bernalillo):

23 districts with a deviation of 10% or greater
16 districts with a deviation of 15% or greater
15 districts with a deviation of 20% or greater

Maximum Deviation: 90%

Plaintiffs' Exhibit 106

SENATE DISTRICTS
(Chaves, Curry, Dona Ana, Eddy, Lea
Otero, Rio Arriba, Santa Fe)

(Ideal: 31,021)

District	Location	Derived Pop. (Votes-Cast Formula)	Total Pop. 1980 Census	% Deviation from Ideal
5	Rio Arriba and	32,244	32,548	+ 4.9
24	Santa Fe	31,494	34,324	+10.6
25	Santa Fe	32,036	25,410	−18.1
27	Curry	30,668	30,910	− .4
32	Chaves	30,629	29,617	− 4.5
33	Eddy and Chaves	31,540	33,800	+ 8.96
34	Eddy	30,023	29,050	− 6.35
36	Dona Ana	32,336	31,981	+ 3.1
37	Dona Ana	31,903	27,719	−10.6
38	Dona Ana	32,101	36,640	+18.1
40	Otero	30,819	33,920	+ 9.35
41	Lea	29,477	31,290	+ .9

Summary

Senate District (Other Counties):

4 districts with a deviation of 10% or greater

2 districts with a deviation of 15% or greater

Maximum Deviation: 36.2%

Plaintiffs' Exhibit 115

SENATE DISTRICTS
(San Juan, McKinley, Bernalillo)

(Ideal: 31,021)

District	Location	Derived Pop. (Votes Cast Formula)	Total Pop. 1980 Census	% Deviation from Ideal
1	San Juan	32,477	26,752	−13.76
2	San Juan	31,589	33,959	+ 9.47
3	San Juan and McKinley	30,883	34,668	+11.76
4	McKinley	32,111	30,913	− 0.35
10	Bernalillo	31,067	31,142	+ 0.39
11	Bernalillo	29,834	43,977	+42.
12	Bernalillo	30,184	36,525	+18.
13	Bernalillo	30,335	31,945	+ 2.9
14	Bernalillo	30,074	36,507	+18.
15	Bernalillo	29,698	27,269	−13.
16	Bernalillo	30,098	18,180	−41.
17	Bernalillo	30,118	37,612	+21.
18	Bernalillo	31,855	25,776	−17.
19	Bernalillo	31,904	35,590	+15.
20	Bernalillo	30,378	22,038	−29.
21	Bernalillo	31,646	27,704	−11.9
22	Bernalillo	30,089	25,469	−18.

Summary

Senate Districts (San Juan, McKinley, Bernalillo):
13 districts with a deviation of 10% or greater
9 districts with a deviation of 15% or greater

Maximum Deviation: 83%